

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES ANDREW HEACOCK,

Defendant-Appellant.

UNPUBLISHED

February 25, 2000

No. 213898

Kalamazoo Circuit Court

LC No. 97-001207-FH

Before: Markey, P.J., and Murphy and R. B. Burns*, JJ.

PER CURIAM.

Defendant appeals as of right from a jury trial conviction for delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Defendant was sentenced to lifetime probation. We affirm.

Defendant first claims that the trial court abused its discretion when it denied defendant's motion for a mistrial. We disagree.

The prosecution's primary witness, a narcotics officer, testified that during a telephone conversation with defendant, defendant stated, "If you need anything, you know, give me a call." The officer testified that based on his police experience and past interactions with defendant, he understood this statement to be a reference to drugs. The officer explained his past interaction with defendant, testifying that the officer, a confidential informant, and defendant had previously been to a particular location where defendant had purchased crack cocaine. The officer then testified that sometime after this phone conversation the officer and defendant again drove to that particular location, at which time defendant again purchased crack cocaine. It is this latter transaction which forms the basis for the charge of which defendant was convicted.

During the officer's testimony defendant moved for a mistrial, objecting to the testimony concerning a previous drug purchase. Defendant noted that this was "other acts" evidence, the admission of which is controlled by MRE 404(b), and contended that because the prosecutor did not

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

comply with the notice requirements of MRE 404(b)(2), the evidence should have been excluded. The trial court allowed the testimony and denied defendant's motion for a mistrial.

The admissibility of evidence is within the discretion of the trial court. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Admissibility rulings "should only be reversed where there is a clear abuse of discretion." *Id.* An abuse of discretion occurs when there is no justification for the trial court's ruling in light of the facts presented. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

MRE 404(b)(2) provides that "[t]he prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." The purpose of the notice requirement is to prevent unfair surprise and provide an "opportunity to marshal arguments regarding both relevancy and unfair prejudice." *People v VanderVliet*, 444 Mich 52, 89, n 51; 508 NW2d 114 (1993). Here, the trial court determined that the prosecutor did not have advance notice of the evidence. The court found that the first indication that defendant had previously purchased crack cocaine in the officer's presence came during opening statements when defense counsel conceded as much. The court held this to constitute good cause excusing pretrial notice. The court further held that because the defense was clearly aware of this evidence, and because the officer essentially volunteered the information, the lack of notice during trial was also reasonable. In light of the facts presented, we conclude that the trial court provided sufficient justification for its admission of the other acts evidence. *Ullah*, *supra* at 673. We find no abuse of discretion. *Starr*, *supra* at 494.

A trial court's ruling on a motion for a mistrial is also reviewed for an abuse of discretion. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). An abuse of discretion will only be found when the denial of the motion deprives a defendant of a fair and impartial trial. *People v Wolverson*, 227 Mich App 72, 75; 574 NW2d 703 (1997). Defendant cannot effectively claim that his right to a fair and impartial trial was impaired by the prosecution's use of this other act evidence because defendant was not unfairly surprised by the evidence. In fact, defendant's own case depended in part on that same evidence. In light of the trial court's appropriate evidentiary ruling, and noting that the court's jury instructions properly cautioned with regard to the use of other acts evidence, we hold that defendant fails to establish that his right to a fair and impartial trial was impaired by the trial court's refusal to grant a mistrial. There was no abuse of discretion.

Defendant's second claim is that the prosecutor's closing argument denied him a fair and impartial trial. Defendant's defense at trial was that he did not know that he was purchasing crack cocaine. In support of this theory, defense counsel stated during opening statement that although defendant had previously been to the location in question with the officer, purchasing a package on both occasions, defendant never knew what he was purchasing. Further, on direct examination defendant denied having any knowledge that he was purchasing drugs. Defendant also testified that he told the police that he did not pick up any crack cocaine. The prosecutor, however, asked defendant on cross-examination about statements that he made to the police at the time of his arrest. Then, during closing argument, the prosecutor commented on defendant's failure, at the time of his arrest, to offer explanations regarding his lack of knowledge to the police.

Defendant argues that the prosecutor improperly used his silence as evidence of his guilt. Defendant also argues that, although he failed to object during trial, a curative instruction would not have eliminated the prejudice caused by the improper statement. We again disagree.

In reviewing claims of prosecutorial misconduct, “[t]he test is whether defendant was denied a fair and impartial trial.” *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Absent objection at trial, however, review of alleged prosecutorial misconduct is precluded unless the prejudicial effect of the misconduct could not have been cured by a cautionary instruction or manifest injustice would result from our refusal to consider the issue. *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996). We find that defendant has failed to meet the requisite showing of either manifest injustice or the ineffectiveness of a curative instruction. Nevertheless, though the issue is not properly before this Court, we briefly address defendant's claim.

Comments by the prosecution are to be read as a whole, and evaluated in relation to defense arguments. *People v Lawton*, 196 Mich App 341, 353, 355; 492 NW2d 810 (1992). “When a defense makes an issue legally relevant, the prosecutor is not prohibited from commenting on the improbability of the defendant’s theory or evidence.” *People v Fields*, 450 Mich 94, 116; 538 NW2d 356 (1995). Moreover, the prosecution can comment on and draw inferences from the testimony of a criminal defendant. *People v Pegenau*, 447 Mich 278, 299; 523 NW2d 325 (1994). In this case, defendant's own testimony placed at issue his knowledge of the contents of the package. Defendant denied having any knowledge that he was purchasing drugs. Accordingly, read in context the prosecutor’s statements during closing argument were permissible commentary on an issue interjected by defendant, and on the testimony put forth by defendant. We hold that the prosecutor’s comments did not violate defendant's right to remain silent, and thus did not deprive defendant of a fair and impartial trial. *Paquette, supra* at 342.

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Robert B. Burns